

VERMONT TRANSPORTATION BOARD MEETING MARCH 4, 2021

Board Members Present:

David Coen, term expires 2/28/24
Richard Bailey, term expires 2/28/24
Wendy Harrison, term expires 2/28/22
Pam Loranger, term expires 2/28/22
Philip Zalinger, term expires 2/28/22

Board Members Absent:

Tim Hayward, term expires 2/28/23

Others Present:

John Zicconi, Board Executive Secretary
Ron Shems, Board Attorney
Gary DuFour, small claimant
Michelle Doucette, small claimant
Brian McIntyre, DuFour witness
Jenny Ronis, Assistant Attorney General
Todd Law, VTrans Director of Maintenance
Rob Faley, VTrans District Administrator for the South West Region
Brian Roberts, VTrans District 1 General Manager

Call to Order:

Chair David Coen called the March 4, 2021 meeting to order at 10:30 a.m., which was held remotely via Microsoft Teams due to the COVID-19 pandemic.

1. NEW BUSINESS

1.1 Review/Approve Minutes of the January 27, 2021 Board meeting.

On a motion by Ms. Loranger seconded by Mr. Bailey, the Board unanimously voted to approve the minutes of the January 27, 2021 Board meeting as submitted.

1.2 TB-467 Doucette Small Claim Remand

Mr. Coen informed everyone that the Board was reopening this case because the Superior Court, which heard VTrans' appeal of the Board's initial decision that was issued on November 1, 2018, remanded the case to the Board because the court concluded it could not reach a decision regarding the Agency of Transportation's claim of sovereign immunity without additional findings of fact. He asked Ms. Doucette if she had additional evidence to introduce. Ms. Doucette said she did not. Mr. Coen then turned to the Agency. Ms. Ronis called on Mr. Law to testify.

Mr. Law said safety is the primary mission of the Agency's maintenance division, and that winter maintenance is one of the division's largest expenditures, making up almost 1/3 of the overall VTrans'

maintenance budget. He said the division itself prioritizes expenditures, not the Legislature, and that much of the budget is “reactionary” rather than long planned. He said Maintenance Division employees use Best Management Practices to guide their decisions and that there is no formal policy that prescribes how to deal with potholes.

Mr. Faley testified roadway safety is the Maintenance Division’s top priority and that managing risk is a significant part of their job. However, there is no policy or order that dictates how they prioritize activity. Instead, Maintenance Division personnel have regular discussions regarding how to prioritize their efforts, not only at the executive level but at the maintenance garage level as well.

That said, dealing with snow is the Maintenance Division’s highest priority and that they do not patch potholes on days when the roadways are snow covered as all resources are dedicated to snow removal. Once roads are clear of snow, district supervisors are allowed to make their own decisions on what work is necessary to ensure roadway safety. While the basic policy is to keep roads in a safe and workable condition, they have constant and continual discussions on how to allocate resources.

Ms. Doucette’s accident occurred on February 22, 2018. Leading up to that day, Mr. Faley said, February 19 was a holiday so maintenance crews did not work. On both February 21 and 22 the weather was warm and crews used three tons of asphalt fill to patch various sections of Route 100, including the general areas where Ms. Doucette hit a pothole. On February 22, the day of Ms. Doucette’s accident, it snowed 3-5 inches and all hands were on deck plowing snow. This decision was based on the Agency’s policy to plow first and deal with other maintenance issues second, he said.

Mr. Roberts testified that on February 22, 2018 plowing snow was the district’s first priority and that due to snow-related road conditions conducting pothole maintenance would have put workers at risk. As to when they do fill potholes, a typical crew involves 4-5 workers but that the Agency has no policy and the state has no laws that dictate how potholes should be filled.

Ms. Harrison asked Mr. Faley why, given the extremely poor and deteriorating condition of Route 100 through Wilmington during the winter of 2018, that the Agency did not either lower the speed limit or close a lane when conditions became bad. Mr. Faley said he’s never known the Agency to close a lane due to a pothole, even a large one. Instead, the Agency allocates additional resources, including pulling workers from neighboring maintenance districts, to repair the roadway to keep all lanes open. As for lowering a speed limit, Mr. Faley said there is a time-consuming procedure required to lower a speed limit so that is not decision that he or his supervisors can make on the spot. Thus that is not something they would typically do.

Mr. Shems asked Mr. Roberts how they decided what maintenance resources Route 100 through Wilmington needed during February 2018? Mr. Roberts said he and his staff met weekly if not daily to discuss the area. On any given day, they assigned whatever resources they believed necessary to keep the roadway safe. Whenever they heard about a pothole, they would mobilize resources as soon as possible, he said. But snow removal always took first priority. Mr. Roberts said he has been employed in various capacities by VTrans for 23 years and that the Agency expended a lot of resources along Route

100 in Wilmington during the winter of 2018 – more so than he could remember the Agency ever expanding on any other single stretch of roadway. He said his crews spent two days prior to Ms. Doucette’s accident using recycled material (a warm asphalt mix) patching potholes along this stretch of Route 100.

Ms. Doucette said the issue here is not just a single pothole but a “long stretch” of roadway that was badly deteriorating. The roadway condition at the time was “the talk of the town,” and numerous vehicles were damaged. The road condition was so bad for so long that she would sometimes drive into the oncoming lane seeking a smoother ride. There was a long-term issue here that was not addressed, she said, and more could have been done to protect the public. An increased effort is what it was going to take to keep the public safe, she said. More could have been done – lowering the speed limit, closing lanes, erecting signs – but they Agency chose not to and she was damaged as a result.

Mr. Coen closed the hearing and gave the parties two week to submit additional information, including several things the Board asked for including a copies of the Agency’s change-of-speed policy, all DWR reports for the dates of February 8-25 that apply to the section of Route 100 in question, the Agency’s safe-roads-at-safe-speeds policy, and any written directive that employees (including supervisors) are given that relate to potholes and pothole repair.

1.3 TB-516 DuFour Small Claim – Hearing

Mr. DuFour told the Board that at 7:45 a.m. on June 17, 2020 that he hit a large pothole on Route 30 while traveling south just before the Manchester town line in the vicinity of Dorr Oil. The impact almost caused him to lose control of the vehicle. Minutes later, one of his vehicle’s tires began losing air pressure and he had to park the vehicle and take a taxi home. The impact damaged plus the taxi ride cost him \$946.51.

He said following his incident he spoke to Brian McIntyre who works at Dorr Oil. Mr. McIntyre informed him the pothole he hit has existed for some time and that other drivers have hit it. Mr. DuFour said he knows that VTrans staff regularly drives around to inspect the roadways. He believes inspection crews should have noticed the pothole and fixed it long before he ever hit it.

Mr. McIntire told the Board that the pothole Mr. DuFour struck has existed for months and that he has received many complaints about it as people sometimes mistakenly assume Dorr Oil is responsible. He said VTrans recently repaved parts of Route 30 in the area, but for some reason they did not pave over the pothole. He said he has never reported the pothole to VTrans, but that when people complain to him he advises them to call the state and report it. He said the pothole measured approximately 2.5-to-3 feet long by 1.5-to-2 feet wide, and was “ankle deep if not deeper.” He said he has never observed VTrans attempt to patch the pothole, which he said had been there “a very long time.”

Mr. DuFour said after hitting the pothole, which was located within the travel lane of Route 30, that he notified the police. He said he believes VTrans to be negligent in not patching the pothole, which he believes has a history of causing complaints.

Ms. Ronis testified that VTrans is protected by sovereign immunity, which it has not waived in this case, and therefore cannot be found liable for Mr. DeFour's loss as the state never received notice that a dangerous pothole in this location existed and therefore it did not know a potentially dangerous situation existed. She called Mr. Faley as a witness.

Mr. Faley said that VTrans was first notified of the pothole on June 17, 2020 likely as a result of Mr. DuFour's incident, and that VTrans crews patched the pothole on June 18. The Agency received no reports about the pothole prior to June 17, 2020.

Mr. Faley said at the time of Mr. DuFour's incident that VTrans had hired a contractor to repave a portion of Route 30 in the area, and that the contractor had maintenance responsibility for the section of roadway where the pothole existed. As a result, that contract indemnifies the state of any responsibility.

Mr. DuFour said the paving contractor was working further north along Route 30 near the Town of Dorset. He said the paving company started its work in early June, and that the pothole existed long before the contractor began work.

Ms. Ronis said that regardless of who had roadway maintenance responsibility at the time of Mr. DuFour's incident, there is no evidence that VTrans had notice that the pothole existed, therefore it cannot be held liable for Mr. DuFour's loss.

Mr. Coen closed the hearing and gave the parties 14 days to submit additional, written information.

At 12:41 p.m. the Board on a motion by Mr. Zalinger, seconded by Ms. Harrison and approved unanimously entered into deliberative session, pursuant to Title 1 § 313, to discuss TB-467 Small Claim of Michelle Doucette and TB-516 Small Claim of Gary DuFour.

Mr. Zicconi was invited to join the deliberative session.

The Board exited deliberative session at 1:02 a.m.

1.4 Board Attorney contract Expiration

Mr. Zicconi informed the Board that Mr. Shem's 4-year contract expires on September 30, 2021 and as a result that the Board must rebid for attorney services. He said there are two ways to do this: 1) open bid where the Board advertises statewide and anyone can bid, or 2) simplified bid where the Board can solicit at least three bids but the contract is capped at \$100,000 and four years. Four years ago the Board chose simplified bid, which worked out well, he said. He advised that the Board do the same this time.

On a motion by Ms. Harrison seconded by Mr. Loranger, the Board unanimously instructed Mr. Zicconi to begin the simplified bid process for contracting with an attorney beginning October 1, 2021.

1.5 *Executive Secretary's Report*

New Board Member: Mr. Zicconi informed the Board that the Governor appointed Tim Hayward to fill a vacant Board term that expires on February 28, 2023.

Next Board Meeting: Mr. Zicconi informed the Board that it needed to schedule its next meeting. The Board chose April 22, 2021.

2. OLD BUSINESS

2.1 *None*

3. OTHER BUSINESS

3.1 *Round Table*

No one had any issues to discuss.

4. ADJOURN

On a motion by Mr. Zalinger seconded by Ms. Harrison, the Board unanimously voted to adjourn at 1:03 p.m.

Respectfully submitted,

John Zicconi
Executive Secretary

Next Board Meeting: April 22, 2021